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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0125**

State of Minnesota,
Respondent,

vs.

Gilbert Lee Rodriquez,
Appellant.

**Filed September 17, 2018
Reversed and remanded
Worke, Judge**

Beltrami County District Court
File Nos. 04-CR-17-2721, 04-CR-16-3811

Lori Swanson, Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, David P. Frank, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for
appellant)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court erred in imposing sentences for both
domestic assault and violation of a domestic-abuse no-contact order (DANCO) because the

offenses were part of a single behavioral incident. We agree, and reverse and remand for resentencing.

FACTS

On August 16, 2017, A.L. reported to police that appellant Gilbert Lee Rodriquez, her former domestic partner and father of her child, entered her apartment and assaulted her. A.L. told police that Rodriquez “attacked her without provocation and struck her multiple times in the face with a heavy backpack.” Police observed that A.L. had significant facial injuries. At the time of the assault, a DANCO was in effect with respect to Rodriquez and A.L.

Rodriquez was charged with one felony count of a DANCO violation and one felony count of domestic assault. Rodriquez pleaded guilty to both counts. Rodriquez admitted that he reviewed the complaint and that it was “essentially true and correct.” He admitted that he had contact with A.L. on August 16 and that they had an argument. Rodriquez admitted that after the argument, he intentionally struck A.L. in her face with his bag.

At the sentencing hearing, Rodriquez argued that because the DANCO violation and domestic assault arose out of the same behavioral incident, the district court could impose sentence on only one count. The district court rejected Rodriquez’s argument and sentenced him to 18 months in prison for the DANCO violation and 21 months in prison for domestic assault, with both sentences stayed for five years. This appeal followed.

DECISION

Rodriquez argues that the district court erroneously concluded that the domestic-assault and DANCO-violation offenses were not part of the same behavioral incident.

“Whether [multiple] offenses were part of a single behavioral incident is a mixed question of law and fact, so [appellate courts] review the district court’s findings of fact for clear error and its application of the law to those facts de novo.” *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). “A factual determination is clearly erroneous if it is unsupported by the record.” *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Under Minnesota law, “if a person’s conduct constitutes more than one offense[,] . . . the person may be punished for only one of the offenses.” Minn. Stat. § 609.035, subd. 1 (2016). Whether multiple offenses were part of a single behavioral incident depends on the facts and circumstances of each case. *State v. Jones*, 848 N.W.2d 528, 533 (Minn. 2014). “Offenses are part of a single course of conduct if the offenses occurred at substantially the same time and place and were motivated by a single criminal objective.” *Id.* The state bears the burden of establishing by a preponderance of the evidence that the conduct underlying the offenses “did not occur as part of a single behavioral incident.” *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

Here, the district court determined that the DANCO-violation and domestic-assault offenses took place at substantially the same time. The complaint alleged that Rodriguez entered A.L.’s apartment and assaulted her. At the plea hearing, Rodriguez admitted that after he argued with A.L., he struck her. The district court’s determination that the two offenses took place at substantially the same time is consistent with the record.

The district court concluded, however, that the two offenses were not motivated by a single criminal objective. Rodriquez argues that this conclusion is not supported by the record and is inconsistent with Minnesota caselaw.

In *State v. Rivers*, the defendant was convicted of burglary, domestic assault, violation of an order for protection (OFP), assault, and child-endangerment domestic assault. 787 N.W.2d 206, 208-09 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010). Rivers argued that the district court erred in sentencing him for both violating the OFP as well as assault. *Id.* at 213. This court agreed, noting that a determination of whether two offenses arose out a single behavioral incident depends upon “whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective.” *Id.* (quotation omitted). This court concluded that “violation of the [OFP] was the means by which Rivers was able to assault [the victim].” *Id.* Therefore, both offenses occurred “as part of a continuous and uninterrupted course of conduct involving one victim.” *Id.*

Here, the record demonstrates that Rodriquez entered A.L.’s apartment and assaulted her. It appears that the DANCO violation was the means by which Rodriquez was able to assault A.L. The state attempts to distinguish *Rivers* by arguing that “[u]nlike the defendant in *Rivers*, who arrived at the victim’s residence for the sole purpose of assaulting the victim, the record in this case establishes that [Rodriquez] went to A.L.’s apartment simply to meet with her in violation of the DANCO.” But *Rivers* does not clearly articulate that the defendant arrived at the residence for the sole purpose of assaulting the victim. Rather, that opinion states that after a hearing on the victim’s petition to make a temporary order for protection permanent, “[the defendant] entered [the victim]’s

apartment uninvited and assaulted her while she was holding their one-year-old daughter.”
Id. at 208.

Furthermore, the record here does not support the state’s assertion that Rodriquez went to A.L.’s apartment simply to meet with her. Instead, the complaint asserted that Rodriquez “walked into [A.L.’s] apartment and assaulted her.” The complaint contains no representation as to why Rodriquez went to A.L.’s apartment. Similarly, during the plea colloquy, Rodriquez admitted that he violated the DANCO and struck A.L., but he did not address why he went to her apartment. Rodriquez admitted only that he contacted A.L., they argued, and he struck her.

The record does not contain any facts suggesting that the DANCO violation was not the means by which Rodriquez assaulted A.L. Therefore, because the state bore the burden of proof to demonstrate that the two crimes were not part of a single behavioral incident, we conclude that the district court clearly erred by sentencing Rodriquez on both counts. We reverse and remand to the district court with instructions to vacate the less serious of Rodriquez’s sentences. *See State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (stating that “an appellate court vacating a sentence . . . pursuant to section 609.035 should look to the length of the sentences actually imposed . . . to ascertain which offense is the most serious, leaving the longest sentence in place”).

Reversed and remanded.